No. 108, Original

1992

IN THE

# Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

*Plaintiff,*

v.

STATE OF WYOMING,

*Defendant.*

## NEBRASKA'S MOTION FOR LEAVE TO FILE HER SUR-REPLY TO WYOMING'S REPLY TO THE UNITED STATES' BRIEF OPPOSING EXCEPTIONS AND BRIEF IN SUPPORT OF MOTION

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The State of Nebraska hereby moves for leave to file her sur-reply to Wyoming's reply to the United States' response to Wyoming's exceptions. As grounds therefor, Nebraska states:

1. The Court's order of May 18, 1992, established the schedule for the filing of exceptions and replies thereto:

> The second Interim Report of the Special Master is received and ordered filed. Exceptions to this Report and the first Interim Report of the Special Master, with supporting briefs, may be filed by the Parties within 45 days. Replies thereto, if any, may be filed within 30 days. The *amici curiae* may file Exceptions and replies within the time allowed the parties. Further consideration of the motion of Nebraska for leave to file an amended petition is deferred to consideration of the Exceptions and replies.

*Nebraska v. Wyoming*, ___ U.S. ___, 112 S.Ct. 1930 (1992) (Docket No. 477). The Court did not require that the filing of a reply to the exceptions of a party or *amici curiae* was contingent on the replying party's prior filing of its own exceptions;

2. Wyoming's motion for leave to file a reply was based on the tacit view that a party could not respond to another

party's exceptions without first having filed its own exceptions;

3. Each party and the *amici* were given the opportunity to respond to exceptions filed by other parties or the *amici*. *Id.* The Court's order of May 18, 1992, did not contemplate replies to the responses. *Id.*;

4. On September 21, 1992, counsel of record for the State of Nebraska received a copy of Wyoming's motion for leave to file her reply to the United States' brief opposing Wyoming's exceptions. Because of two operations, hospitalization between September 10, 1992, and September 28, 1992, and related medication, counsel of record was unable to review Wyoming's motion for leave to file her reply until September 28, 1992;

5. On October 5, 1992, the Court granted the State of Wyoming's motion for leave to file her reply;

6. While ostensibly replying only to the United States' brief, Wyoming's reply also addresses positions taken by the State of Nebraska; and

7. In the guise of correcting "misstatements of fact in the United States' brief," Wyoming herself distorts important facts which bear on the resolution of the issues directly affecting the State of Nebraska.



Wherefore, Nebraska requests that the Court grant Nebraska's motion for leave to file her sur-reply to Wyoming's reply.

Respectfully submitted,

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## ARGUMENT

The Court's order of May 18, 1992, provided the parties and the *amici curiae* 45 days within which to file exceptions to the first and second interim reports of the Special Master and 30 days thereafter within which to file replies. *Nebraska v. Wyoming*, ___ U.S. ___, 112 S. Ct. 1930 (1992) (Docket No. 477). On July 1-2, 1992, Nebraska, Wyoming, Colorado, and Basin Electric filed exceptions. On August 14-17, 1992, Nebraska, Wyoming, the United States, Basin Electric, the National Audubon Society, and the Platte River Whooping Crane Critical Habitat Maintenance Trust filed replies.

Wyoming filed her motion for leave to file an additional reply brief on September 15, 1992.[1] The Court granted the motion on October 5, 1992. While Wyoming's reply brief is ostensibly directed to the United States' "opposition" or reply to Wyoming's exceptions, Wyoming's brief is also a reply to Nebraska's response to Wyoming's exceptions, both

[1] *See* Wyoming Motion for Leave to File a Reply Brief and Wyoming Brief in Reply to Brief for the United States Opposing Exceptions (Sept. 15, 1992) ("Wyoming's Reply Brief").

explicitly and indirectly. *See, e.g.*, Wyoming's Reply Brief (Sept. 15, 1992) at 10 n.8, 21 n.16. Instead of responding to all of Wyoming's arguments in her reply brief, Nebraska will only address the misleading or patently inaccurate assertions of fact.

First, Wyoming attempts to equate the Special Master's recommended resolution of the Inland Lakes' priority with her argument that the Court placed diversion and irrigated acreage limitations on individual Nebraska canals in the Whalen/Tri-State reach of the North Platte River. *Id.* at 15. Wyoming contends that if the Inland Lakes' right to store 46,000 acre feet of natural flow during the non-irrigation season is a "vital underpinning" of the Decree, it must necessarily follow that limitations were placed on individual canals. *Id.* The Court's apportionment of the use of the Inland Lakes to Nebraska, however, is not comparable to the "limitations" on individual canals in Nebraska.

In 1945 the Court determined the Inland Lakes' non-irrigation season storage right in order to equitably apportion the natural flow of the North Platte River between Nebraska and Wyoming during the irrigation season. *Nebraska v. Wyoming*, 325 U.S. 589, 646 (1945); Doherty Report at 60-61, 86-87 (Table XVII n.2). As Wyoming has admitted, the Court deducted water from Nebraska's irrigation season apportionment because of the apportionment of the storage of non-irrigation season flows in the Inland Lakes. Wyoming's Reply Brief (Sept. 15, 1992) at 14. The Court contemplated that the Inland Lakes would continue to store natural flow during the non-irrigation season as an explicit part of Nebraska's apportionment, and the parties' countervailing equities were fixed accordingly. Had the Inland Lakes not been available to store natural flow during the non-irrigation season, Nebraska's irrigation season apportionment would have been greater and Wyoming's would have been less. While the United States has stated that the Inland Lakes are a "vital underpinning" of the total apportionment, it is more accurate to state, as Special Master Doherty, the Court, and Special Master Olpin have,



that the use of the Inland Lakes is an express part of Nebraska's equitable apportionment. Second Interim Report (Apr. 9, 1992) (Docket No. 463) at 32-35.

In contrast to Nebraska's apportionment of the use of the Inland Lakes, each canal's water "requirement" was derived from data used to determine irrigation demands in Nebraska and Wyoming. Special Master Doherty compared the cumulative irrigation demands in Nebraska with the cumulative irrigation demands in Wyoming to arrive at the proper allocation of natural flow between the states.[2] As Master Doherty noted, the dependable natural flow was able to meet only 48 percent of the requirements in the Whalen/Tri-State reach of the river. Doherty Report at 72. With an inadequate water supply the question became how to equitably allocate the natural flow between the states. When the Court accepted Master Doherty's recommendation to apportion the flows to the North Platte River in the Whalen/Tri-State reach 75% to Nebraska and 25% to Wyoming, the canal requirements had no further significance than to explain, in part, how the allocation was achieved. *See* Second Interim Report (Apr. 9, 1992) (Docket No. 463) at 95-99. The diversion requirements were not substantive elements of the equitable apportionment. On the contrary, Master Doherty recommended and the Court held that the so-called diversion requirements were not limitations on individual canals. 325 U.S. at 628-29; Doherty Report at 54, 115, 149-50, 160-61.

Second, Wyoming states that there has been no consistent operational practice for the Inland Lakes since the Decree

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[2]Wyoming contends that each canal's water "requirements" were "generously based on conditions of full supply." Wyoming's Reply Brief (Sept. 15, 1992) at 10 n.8. To the contrary, canal requirements were based on historical uses during the most extreme drought of the century. For example, Master Doherty reduced permitted irrigated acreage to acres actually irrigated and based average headgate diversions on years during the drought. Doherty Report at 58, 196-267. The average river flow between 1931 and 1940 was only 63 percent of the previous long-term average. *Id.* at 39-40.

was entered in 1945. Wyoming's Reply Brief (Sept. 15, 1992) at 4. Wyoming cites inapposite evidence of the non-irrigation season diversions into the Interstate Canal to support her position.

The operating and accounting procedures agreed upon by Nebraska, Wyoming, and the United States since the Decree was entered in 1945 reaffirm that the Inland Lakes have the right to accrue 46,000 acre feet of natural flow during October, November, and April with a priority of December 6, 1904. This water is often temporarily stored in Glendo or Guernsey reservoirs. Neither the Inland Lakes storage right nor the method or practice of accrual has changed in any significant way since the Decree was entered.

Contrary to what Wyoming implies, variance in non-irrigation season diversions into the Interstate Canal does not equate to inconsistency of operation of the Inland Lakes. Water years are highly variable. For example, the computed annual runoff at Pathfinder Reservoir has ranged from 2,159,300 acre feet to 566,700 acre feet between 1960 and 1990. Wyoming Second Motion for Summary Judgment and Brief in Support (Feb. 22, 1991) (Docket No. 294) (Affidavit of John W. Shields, Table II). During the same period, the October, November, and April accretions below Alcova Reservoir have varied from 22,800 acre feet to 137,300 acre feet. Response of the United States to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) (Affidavit of David G. Wilde, Table 10). In low flow years, the Inland Lakes are unable to receive their full entitlement — 46,000 acre feet — because there is not enough water in the system. Conversely, in high flow years, the Inland Lakes store water in excess of their rights rather than allow excess water to escape the system unused, a common practice in the arid West. Accordingly, variations in the Interstate Canal non-irrigation season diversions do not result from different operational practices for the Inland Lakes, but rather to the fluctuations in and attempts to make maximum beneficial



use of the annual water supply. The Inland Lakes operational practice has not changed at all.

Third, Wyoming contends that the Glendo Definite Plan Report ("DPR") is insignificant in relation to the right to store 46,000 acre feet of natural flow in the Inland Lakes during the non-irrigation season and to the temporary storage of Inland Lakes' water in Guernsey and Glendo reservoirs. Wyoming's Reply Brief (Sept. 15, 1992) at 2-3. The DPR was prepared to describe the integration of a new reservoir — Glendo Reservoir — into the system-wide operation of the pre-Decree federal reservoirs and prior appropriators. Wyoming attempts to minimize the role that the DPR had in relation to the parties' approval of the Glendo Project and the related stipulation amending the Decree. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). The parties stipulated to the post-Decree construction of Glendo Reservoir on the condition that it would not interfere with prior existing rights on the North Platte River except in specifically stated quantities. The DPR showed that the Inland Lakes comprised a prior existing right which was entitled to fill ahead of Glendo during the non-irrigation season. Bureau of Reclamation Definite Plan Report (Dec. 1952) at 23, 24 (columns 45-51), 126-27 (attached to the Third Affidavit of David G. Wilde — United States Motion for Summary Judgment on the Inland Lakes (Mar. 4, 1991) (Docket No. 297)). The DPR also reflects that water is temporarily stored in Guernsey Reservoir. *Id.*

The Definite Plan Report was not incorporated into the Decree. Rather, the Decree makes reference to general operational provisions for Glendo as set forth in the DPR. This does not nullify the importance of the Glendo Definite Plan Report or the fact that the parties relied on the findings in the Report when stipulating to the construction of Glendo Dam and Reservoir. The DPR is not a source of rights for parties, but evidence of what the parties and the post-Decree administrators recognized their rights were.

Finally, Wyoming states that when the U.S. Army Corps of Engineers ("Corps") reviewed the proposed Deer Creek

Project to determine whether to grant a § 404 permit under the Clean Water Act, the Corps determined that the project would have "no significant impact on the North Platte Project, the Inland Lakes, or the irrigation season supplies that make up Nebraska's natural flow apportionment." Wyoming's Reply Brief (Sept. 15, 1992) at 4-5. Wyoming's assertion is wrong for three reasons. First, issues relating to impacts on a state's equitable apportionment can only be heard by the Court. *See* U.S. CONST. art. III, § 2, cl. 2. The Corps never undertook this responsibility. In this original action, the affidavits of record demonstrate that the construction and operation of the proposed Deer Creek Project will adversely impact Nebraska's apportionment and the water supply of the North Platte Project. *See* Nebraska's Response to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) ([First] Affidavit of H. Lee Becker); Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ([Third] Affidavit of H. Lee Becker); Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment (Apr. 25, 1991) (Docket No. 335) ([Fourth] Affidavit of H. Lee Becker); Response of the United States to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) (Affidavit of David G. Wilde). These affidavits constitute the relevant record for the Court's consideration. The Corps' administrative record relates to a different and decidedly limited issue, *i.e.*, the potential adverse impacts on downstream wildlife habitat. Second, the Court is reviewing Master Olpin's first and second interim reports, not the Corps' administrative record. Master Olpin found that there are genuine issues of material fact relating to the impacts of the proposed Deer Creek Project which preclude summary judgment. First Interim Report (June 14, 1989) (Docket No. 140) at 30-31; Second Interim Report (Apr. 9, 1992) (Docket No. 463) at 75-77. This is the issue before the Court, not an evaluation of the issues before the Corps. Third, while the issue of whether the Corps' analysis was based on a contrived and faulty computer model is being



litigated on appeal from the Corps' decision, even the computer model utilized by the Corps in the § 404 proceedings shows that depletions occurred in North Platte Project ownerships and to water which historically had been divided between Nebraska and Wyoming. *Jess v. West*, Civ. No. 88-L-308 (D. Neb. filed Aug. 1, 1988); Supplemental Information Document, Deer Creek Final EIS (Apr. 1988) p. 4, 23.

## CONCLUSION

Wyoming's reply brief consists in large part of misstatements of fact directed against Nebraska. Wyoming makes baseless allegations of inefficiency and wasteful irrigation practices in Nebraska acquiesced to by the United States. These allegations arise from Wyoming's counterclaim and her attempt to limit Nebraska's evidence of successive uses of apportioned water expressly recognized by the Court in 1945. Wyoming's effort to "define" Nebraska's apportionment solely in terms of the first diversions of apportioned natural flow is nothing more than a hidden attempt to preclude evidence comprehending Special Master Doherty's and the Court's reliance on return flows below Tri-State Dam in effectuating the apportionment in 1945.

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